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No. 04-582

Supreme Court, U.S.
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In The
Supreme Court of the United States

RUI ONE CORPORATION,

Petitioner,

v.

CITY OF BERKELEY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, THE NATIONAL RESTAURANT ASSOCIATION, THE CALIFORNIA RESTAURANT ASSOCIATION, THE WASHINGTON RESTAURANT ASSOCIATION, AND THE ORIGINAL FISHERMAN'S WHARF RESTAURANT ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENTS OF INTEREST OF AMICI

The Chamber of Commerce of the United States of America ("Chamber"), The National Federation of Independent Business ("NFIB") Legal Foundation, The National Restaurant Association ("NRA"), The California Restaurant Association ("CRA"), The Washington Restaurant Association ("WRA") and The Original Fisherman's Wharf Restaurant Association ("FWRA") submit this brief in support of Petitioner RUI One Corporation ("RUI").[1]

The Chamber is the world's largest business federation. The Chamber represents more than three million businesses and organizations in every size, sector and geographic region of the country. The Chamber represents the interests of its members in litigation, raising issues of widespread concern to American businesses.

The NFIB Legal Foundation is the legal arm of the NFIB, the Nation's oldest and largest organization dedicated to representing the interests of small business owners throughout all 50 states. The approximately 600,000 NFIB members own a wide variety of small businesses, including restaurants, neighborhood retailers, service companies and manufacturers. The NFIB Legal Foundation is a nonprofit public interest law firm established to protect the rights of America's small business owners.

Founded in 1919, the National Restaurant Association is the leading business association for the restaurant industry. The NRA's mission is to represent,

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* file this brief with the consent of the parties. Evidence of consent is filed concurrently with the brief. *Amici* disclose pursuant to Supreme Court Rule 37.6 that no counsel of any party authored any part of this brief, and no person or entity, other than the listed *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief.

educate and promote a rapidly growing industry of 878,000 businesses employing 12 million people. The NRA's 60,000 member companies represent more than 300,000 restaurants.

The CRA was founded in 1906 and represents more than 20,000 businesses throughout California. The CRA's mission includes voicing the California restaurant industry's concerns.

For 75 years, the WRA has been the leading business association for Washington's restaurant industry. The WRA represents more than 4,000 businesses. The 11,000 restaurant businesses are Washington's largest private employer, each year contributing 8.4 billion dollars to the state economy, generating 474 million dollars in state taxes, and paying employees more than 2.3 billion dollars.

The FWRA represents restaurants operating at the historic Fisherman's Wharf in San Francisco, California. Fisherman's Wharf is just a few miles from Petitioner's restaurant.

The restaurant industry includes more than 878,000 employers, which employ over 12 million employees, making it the largest private sector employer in the country. The restaurant association *amici* have joined here to speak with one voice about the serious consequences of the Ninth Circuit's "virtually unreviewable" standard of review applied to local laws targeted against individual businesses. The court of appeals' standard will allow unions and other special interest groups to advocate with impunity legislation aimed at intimidating or retaliating against those with diverging political or economic interests.

STATEMENT OF THE CASE

In 1999, the City of Berkeley ("Berkeley" or the "City") commissioned a living wage analysis (the "Analysis") to evaluate the impact of establishing a living wage ordinance

(the "LWO"). *See RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1158 (9th Cir. 2004) (Bybee, J., dissenting). The Analysis included the financial impact of imposing a living wage on the City's lessees, including a small group operating near the Berkeley Marina. The author of the Analysis concluded that because applying a living wage ordinance to Marina businesses would have a "major impact," the City "should consider rent adjustment times for triggering living wage requirements." *Id.* at 1159. The author warned the City that Marina lessees "may demand reduced rent if they are required to comply with the living wage ordinance." *Id.*

In May 2000, the Berkeley City Manager issued his recommendations to the City Council. The City Manager noted the "living wage advocacy community" was urging the City Council to apply the proposed living wage ordinance to businesses operating at the Berkeley Marina (the "Marina Zone"). *Id.* The City Manager issued a follow-up recommendation against applying the ordinance to the Marina Zone, stating "[t]hose leases most targeted by the living wage advocates, the Marina leases, do not have open negotiations for anywhere from 10-15 years." *Id.* The "living wage advocates" actually was Respondent The Hotel Employees & Restaurant Employees Union Local 2850 ("Union"), which was attempting to organize workers at the Radisson Hotel located on the Berkeley Marina. *See Id.* at 1160.

On June 27, 2000, the City adopted a living wage ordinance ("LWO"). *Id.* at 1159. Covered employers were required to pay workers $11.37 hourly if they elected not to provide employer-sponsored healthcare, and to give employees twenty-two (22) days off annually, of which twelve (12) were paid days off. *Id.* at 1159. The ordinance exempted employers who negotiated union collective bargaining agreements (CBAs), regardless of whether wages and benefits under the CBA met the LWO's minimum standards. *Id.* at 1159. Consistent with the Analysis, Berkeley did not apply the LWO to its existing lessees,

choosing instead to apply the LWO to businesses with leases commenced or renegotiated after its effective date. *Id.* at 1160.

In July 2000 the Union again asked the City Council to adopt a "Marina Zone ordinance." *Id.* at 1160. The Union even asked the City Council to "restructure" workloads at the City Attorney's office to do so. *Id.* In response to pressure from the Union, on September 19, 2000, the City Council adopted Ordinance No. 6583-N.S. ("the Marina Amendment"), which mandated that all businesses of a qualifying size within the Marina Zone were immediately subject to the LWO. *Id.* at 1160.

Petitioner RUI, one of three businesses targeted by the Marina Amendment, had such an existing lease with Berkeley. RUI had renegotiated its lease with the City in 1996. The parties bargained for such items as a $50,000 grease trap, $7,000 landscaping, and compliance with the City's nondiscrimination policies. The parties also agreed to insert an integration clause into the lease. The lease said nothing about mandatory wages or benefits. *Id.* at 1162.

On October 19, 2000, RUI sued the City, arguing in part that the Marina Amendment violated the Equal Protection and Contract Clauses of the United States Constitution. Four days after the City answered, the Union filed a motion to intervene.[2] The Union in its request to intervene admitted that it had "lobbied for the passage of the Ordinance, including its amendment to ensure its immediate implementation by the businesses on the publicly-owned marina such as Plaintiff's Skates Restaurant." Memorandum in Support of Motion to

[2] The Ninth Circuit majority below incorrectly noted the Union intervened "over one year after this litigation was commenced." Opinion at Pet. App. 14a. The Union was an active party from the outset of RUI's challenge, further demonstrating the true intent behind the Marina Amendment.

Intervene, filed November 13, 2000, RUI One v. Berkeley (N.D. Cal. Case No. 00-3878SI), at 2. The Union believed the failure to apply the ordinance to non-union Marina employers would provide the Union "employers with the incentive to reduce their compensation in the next round of contract negotiations." Declaration of Stephanie Ruby in Support of Motion to Intervene, filed November 13, 2000, RUI One v. Berkeley (N.D. Cal. Case No. 00-3878SI), at 2. As such, the Union wished to strengthen its position in collective bargaining agreement ("CBA") negotiations, including its initial CBA negotiations with the Radisson.

SUMMARY OF ARGUMENT

1. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution ensures similarly situated persons and businesses are treated consistently. *See* U.S. Const., amend. XIV, § 1. Courts must be vigilant in assuring that legislation applicable only to one or a small group of businesses is enacted for an appropriate purpose. Here, Berkeley targeted a few employers to help the Union. The Union even drafted the challenged legislation and secured a complete exemption from the living wage ordinance for unionized employers, regardless of whether wages under the collective bargaining agreement met the threshold imposed on non-union employers. The Union's/Berkeley's articulated justification for the law had little to no relationship to the actual reason these employers were selected.

2. Judicial scrutiny of narrow-cast legislation provides some protection from laws passed at the behest of special interests for the purpose of harming their foes. The checks and balances present when governments pass laws of general applicability are absent when the legislature passes a law targeting one or two businesses. By allowing Berkeley to unilaterally impose lease terms it failed to win at the bargaining table, the Ninth Circuit abdicated its duty to review and gave municipalities unfettered power to target individual businesses. The court below injected an alarming degree of uncertainty

into every municipal contract. Small and large businesses alike must have some assurance that state and local governments will not add or fundamentally alter contractual provisions. Although this case involves a city government succumbing to the demands of organized labor, the next case could involve virtually any special interest and any political agenda.

3. The opinion below is an aberration. The court below chose to apply to "class of one" challenges the traditional Equal Protection Clause test applied to laws of general applicability, *i.e.*, a law will survive an equal protection challenge so long as there is "'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *RUI One*, 371 at 1154 (*quoting FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). That deferential analysis should not be applied in "class of one" cases. As Justice Breyer noted in his concurrence in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000), illegal motivation *is relevant* to establishing equal protection violations when an ordinance targets a class of one. *Id.* at 565-66 (Breyer, J., concurring). The majority in *Olech* did not find it necessary to consider the issue of subjective motivation, because the plaintiffs had made out an equal protection violation by showing that they were treated differently from those similarly situated and that the treatment was irrational and arbitrary. Lower courts have struggled to apply *Olech*. But each circuit to have considered the issue (including the Ninth Circuit in a decision issued after the opinion below) recognizes a plaintiff can establish an equal protection violation by establishing disparate treatment based on an impermissible motive. Some lower courts have adopted Justice Breyer's concurrence in *Olech* and have *required* "class of one" plaintiffs to establish an improper motive. Others, including the Ninth Circuit itself, have held *Olech* created an alternative test, whereby "class of one" challenges may be asserted *either* by proving improper motive *or* an irrational relationship between the legislation and its stated purpose.

4. The Ninth Circuit's complete refusal to even consider the City's actual motivation warrants this Court's attention. The evidence established the Marina Amendment was motivated by the Union's desire to organize RUI's employees. The City thus violated well-settled principles of federal labor law by taking sides in an ongoing labor dispute and altering the delicate balance of power between employers and unions. Berkeley's patently unlawful purpose in passing the Marina Amendment, imposing the LWO on non-union Marina lessees while exempting other lessees until lease renegotiation time, establishes a violation of the Equal Protection Clause.

5. The court of appeals' Contract Clause analysis also is flawed. Courts ordinarily apply special scrutiny when state or local governments use their legislative power to inject new terms into their own contracts. To appease the Union, the City passed an ordinance directed only at a couple of its lessees. In doing so, Berkeley violated the Contract Clause. For that reason as well, the Court should grant RUI One's Petition for Certiorari.

ARGUMENT

I. The Ninth Circuit's Opinion Effectively Eliminates Judicial Review of Legislation Intended to Injure A Politically Unpopular Business

A. The Ninth Circuit Refused to Consider Berkeley's Improper Motive

RUI demonstrated the Union targeted the Marina businesses for two unlawful reasons. First, the Marina Amendment assisted the Union in its efforts to win an NLRB election at the Radisson Hotel. Because the LWO essentially required wages and benefits commensurate with the Union's demands, and the LWO exempted unionized employers, applying the LWO to the Radisson in effect eliminated the hotel's concerns about unionizing. Second, the Union targeted Petitioner's restaurant to eliminate a wage disparity with the unionized HS Lordships restaurant. As the Union

chief explained to the Berkeley City Manager, the Marina Amendment would eliminate HS Lordships' argument for seeking a wage concession during contract negotiations.

Judge Bybee in the dissent below cited the record evidence demonstrating the City's pro-union motivation. *RUI, supra*, 371 F.3d at 1160 (Bybee, J., dissenting). Refusing to even *consider* the City's improper animus, the majority below concluded:

> Although the dissent cites additional facts that it states "reveal why the Marina Amendment is an improper exercise of municipal authority," . . . these facts are introduced solely to establish a supposed nefarious motive on behalf of the City Council. *Such facts are wholly irrelevant, however, as our analysis of the constitutionality of an ordinance must proceed from the text of the ordinance, not the alleged motives behind it. See Golden State Transit Corp. v. City of Los Angeles*, 686 F.2d 758, 761 (9th Cir. 1982) ("It is well settled that a reviewing court 'will not strike down an otherwise constitutional statute on the basis of an allegedly illicit legislative motive.'") (*quoting United States v. O'Brien*, 391 U.S. 367, 383 (1968)).[3]

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[3] The Ninth Circuit's reliance on its decision in *Golden State* is odd, as this Court reviewed and rejected the Ninth Circuit's rationale in that case. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 610-611, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986). In *Golden State*, the teamsters pressured the Los Angeles City Council to condition renewal of taxi leases on settlement of a labor dispute. *Golden State*, 475 U.S. at 610-611. The Council contended it was only attempting to ensure "quality taxicab service and adequate compensation for taxicab drivers." *Golden State, supra*, 686 F.2d at 761. In vacating a lower court injunction based on the Council's "true purpose," the Ninth Circuit argued that courts are "not permitted to inquire into alleged motives of legislators." *Id.* at 759. This Court rejected that argument and found the legislation was preempted because the city had attempted to alter parties' bargaining positions in an ongoing labor dispute. *Golden State, supra*, 475 U.S. at 618. The same principle applies to Berkeley's passage of the Marina Amendment.

RUI, supra, 371 F.3d at 1146 n. 7 (emphasis added).

Thus, ignoring the City's improper purpose, the panel's majority instead reviewed the legislation to determine "whether there is 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* at 1154 (*quoting FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). RUI therefore had the burden of negating "every conceivable basis which might support" the Marina Amendment. *Id.* at 1155 (*quoting Lehnhanusen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

The majority briefly acknowledged "class of one" challenges, which it held were based on intentional disparate treatment with no rational basis. *Id.* at 1156. The majority, however, completely ignored "ill will" or "improper motive" as a basis for the challenge, contrary to and in conflict with courts throughout the country and this Court's *Olech* decision.

B. The Ninth Circuit's Refusal to Consider Improper Motive Deepens a Conflict Among the Circuits and Is Contrary to Supreme Court Precedent

In *Village of Willowbrook v. Olech, supra*, the Olechs alleged the Village of Willowbrook conditioned approval of access to the municipal water supply on a discriminatory easement because the couple had previously sued the village. 528 U.S. at 563. The Seventh Circuit upheld the Olechs' Equal Protection Clause challenge, "holding that a plaintiff can allege an equal protection violation by asserting that state action was motivated solely by a 'spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective.'" *Olech, supra*, 528 U.S. at 564 (*quoting* 160 F.3d 386, 387 (7th Cir. 1998)).

This Court held that individuals can bring "class of one" Equal Protection Clause claims regardless of membership in a class or group. *Id.* at 565. Although this Court upheld the Seventh Circuit's decision, the case was decided under a

traditional Equal Protection Clause analysis, whereby "the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* at 564. (citations omitted). Therefore, this Court found it unnecessary to address the viability of the Seventh Circuit's "alternative theory" based on "subjective ill will." Justice Breyer concurred in *Olech* based on evidence the village acted with "vindictive action," "illegitimate animus," or "ill will." *Id.* at 565-66 (Breyer, J., concurring).

The decision at bench conflicts with the Ninth Circuit's own later decision in *Squaw Valley Development Company v. Goldberg*, 375 F.3d 936 (9th Cir. 2004). The Ninth Circuit concurred with the Second and Fifth Circuits, allowing "class of one" "selective enforcement" equal protection claims, based on an argument the government action was motivated by an improper purpose. The court held that a plaintiff may survive summary judgment on an Equal Protection claim by "creating a triable issue of fact that either: (1) the proffered rational basis was objectively false; or (2) the defendant actually acted based on an improper motive." *Squaw Valley, supra*, 375 F.3d at 946 (reversing grant of summary judgment based on disputed facts concerning impermissible motive).

The Seventh Circuit noted following *Olech* that "[t]he role of motive is left unclear. . . ." *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000). Although this Court expressly declined to reach the "alternative" ill will argument relied on by Justice Breyer, the Seventh Circuit has assumed the Court affirmed its requirement that ill will motivate the decision. *Id.* at 1008.

The First Circuit reviews subjective motivation when analyzing "class of one" challenges. In *Tapalian v. Tusino*, 377 F.3d 1 (1st Cir. 2004), the court upheld a verdict in favor of a contactor subjected to onerous construction requirements for allegedly failing to provide the public works superintendent with female companionship. The court held that to state a valid equal protection claim, Tapalian had to

prove that "'compared to others similarly situated, [he] was selectively treated . . . based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" *Id.* at 6 (*quoting Barrington Cove Ltd. P'ship v. R.I. Hous. and Mortgage Fin. Corp.*, 246 F.3d 1, 7 (1st Cir. 2001)).

The Sixth Circuit has recognized that, after *Olech*, "class of one" challengers can succeed *either* by demonstrating the action had "no rational basis" *or* by demonstrating the government actor had "a bad reason" for the alleged disparate treatment. *Boone v. Spurgess*, 385 F.3d 923, 932 (6th Cir. 2004). Similarly, the Tenth Circuit recognized an alternate "class of one" argument where plaintiffs can demonstrate they were subject to disparate treatment due to some "animosity." *See Bartell v. Aurora Public Schools*, 263 F.3d 1143, 1149 (10th Cir. 2001).

The Second Circuit has held that it is not necessary to prove malice or bad faith as part of a "class of one" violation. *See Harlen Associates v. Village of Mineola*, 273 F.3d 494, 499-500 (2nd Cir. 2001) (recognizing circuit split). That court also has confirmed that "class of one" challenges based on impermissible motive can be brought as "selective enforcement" claims. *See African Trade & Information Center, Inc. v. Gates*, 294 F.3d 355 (2nd Cir. 2002) (recognizing the plaintiffs could proceed under a selective enforcement challenge by demonstrating "impermissible" motive); *see also Cobb v. Pozzi*, 363 F.3d 89, 109 (2nd Cir. 2003) (recognizing "two related, yet different, equal protection arguments").[4]

[4] The Fifth Circuit also categorizes "impermissible motive" challenges as "selective enforcement" claims. *See Beeler v. Rounsavall*, 328 F.3d 813, 817 (5th Cir. 2003).

C. The Marina Amendment Violated the Equal Protection Clause

1. Berkeley Passed the Marina Amendment to Assist the Union

Employers often oppose union organizing drives because they perceive recognizing a union will increase costs. The Marina Amendment was nothing more than the Union's obtaining from Berkeley assistance with its organizing and bargaining efforts. By having the City Council apply the LWO to Marina businesses, the Union forced the Radisson Hotel to raise wages and confer benefits regardless of whether the hotel employees were unionized. As such, the Radisson had less incentive to oppose the Union's organizing efforts. In addition, the Union had successfully lobbied to exempt unionized employers from the LWO. As such, by recognizing the Union, the Radisson could avoid the LWO's mandatory leave, wage, and benefit requirements.

As the Union noted when it advocated the Marina Amendment, applying the LWO to the non-union Marina restaurants would strengthen the Union's bargaining position with HS Lordships, a unionized Marina restaurant. Without the Marina Amendment, the Union feared that HS Lordships would insist on wage concessions during contract negotiations.

Berkeley's conduct in the instant case is part of a broader trend. Unions increasingly have enlisted the assistance of sympathetic state and local governments to fatten their membership rolls. In 2000, for example, the California Legislature enacted Assembly Bill 1889 which, among other prohibitions, forbade employers leasing state property from opposing union organizing campaigns on such property. *See* Cal. Govt. Code § 16645.5. AB 1889 also prohibited government contractors or employers receiving state reimbursement from using state funds to oppose union organizing drives. *See id.* § 16645.7. The Ninth Circuit struck down the law, recognizing that when reviewing legislation that alters the power balance between unions and

employers, the focus is on the "statute's function, not its form." *Chamber of Commerce of U.S. v. Lockyer*, 364 F.3d 1154, 1167 (9th Cir. 2004), *pet. for reh'g filed*. Had the Ninth Circuit applied the "function over form" standard to the Marina Amendment, it surely would have struck it down.

2. Berkeley's Assistance to the Union Violated Federal Labor Law

Just as California illegally chose sides in favor of union organizing when it passed AB 1889, albeit on a grander scale, Berkeley enacted the Marina Amendment to assist the Union's organizing and negotiating efforts at the Marina. Berkeley's conduct violates federal labor law, thereby establishing Berkeley (1) treated Petitioner different from other existing non-union lessees by applying the LWO to Petitioner and (2) an illegal motivation behind the disparity – unlawful assistance to the Union, there is a sufficient basis for a challenge under the Equal Protection Clause.

Congress passed the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* to create a uniform body of federal labor law. In *Lodge 76, IAM, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976), this Court recognized the NLRA mandates that the "'free play of economic forces,'" controls the balance of power between unions and employers, without inference by government regulation. *Id.* at 140 (*quoting NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)). In short, "[n]o state or federal official or governmental entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1993); *see also Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1413 (9th Cir. 1996) ("'[T]he crucial inquiry regarding preemption is . . . whether the exercise of plenary state authority to *curtail* or *entirely prohibit* self-help would frustrate

effective implementation of the Act's processes.'") (emphasis added) (*quoting Golden State, supra*, 475 U.S. at 615).

As this Court recognized, "'[f]ree collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA.'" *Golden State, supra*, 475 U.S. at 619 (*quoting New York Tel. Co. v. New York Labor Dept.*, 440 U.S. at 551 (Powell, J., dissenting)). Local governments simply cannot become parties to collective bargaining negotiations by introducing or altering a standard of properly "balanced" bargaining power. *Id.*

Berkeley unabashedly passed the Marina Amendment to help the Union achieve its organizing and bargaining goals. The Ninth Circuit deemed the uncontroverted evidence as irrelevant. Had the Ninth Circuit considered this evidence, the Marina Amendment could not have withstood judicial review. Finally, the Ninth Circuit has departed from a large body of case law in finding irrelevant Berkeley's unlawful motivation. This Court therefore should grant the Petition.

3. The Marina Amendment Fails Even Traditional Equal Protection Clause Analysis Because There Is No Rational Basis for the City's Differential Treatment

The Marina Amendment fails *even* under the Ninth Circuit's erroneous construction of the Equal Protection Clause. The Ninth Circuit has recognized that to satisfy the test of "any reasonably conceivable set of facts that could provide a rational basis," the challenging party must demonstrate the law does not "rationally further[] a legitimate state purpose." *Seariver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002). Moreover, "there is no rational basis for state action 'that is malicious, irrational or plainly arbitrary.'" *Squaw Valley, supra*, 375 F.3d at 945.

As a general proposition, the efficacy of living wage ordinances is dubious.[5] The small businesses that drive this economy cannot sustain the enormous burden they impose. Living wage legislation actually results in more productive, but fewer, employees. The most effective response to increased wages is to constrict a workforce to maintain labor costs. Although living wage proponents allege the cost is merely transferred to customers, in reality the only competitive choice is to terminate employees. Otherwise, the one competitor who opts to pass on costs to customers rather than adjust labor costs will soon find itself terminating its entire workforce in a business closure.

This case, however, does not involve living wage ordinances *generally*. The Marina Amendment fails review because it ultimately singled out one, non-union, Marina lessee – Petitioner – for malicious, irrational, and arbitrary reasons. There is no rational basis for believing that Berkeley would effectively combat poverty by targeting RUI. *See Zobel v. Williams*, 457 U.S. 55, 63, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982) (the differential treatment must further the asserted interest). HS Lordships was exempt as a unionized employer. Thus, the Marina Amendment actually affected just two employers – RUI and the Radisson Hotel. Once the Radisson unionized, only RUI was affected by the Marina Amendment, which was the Union's intent all along. Berkeley failed to articulate any rational basis for targeting RUI as a remedy for Berkeley's working poor, as there is no proof that RUI's employees were poor in the first place.

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[5] The Pacific Legal Foundation, a fellow *amicus*, provides extensive specific information demonstrating the disadvantages of living wage ordinances generally.

D. The Ninth Circuit's "Class of One" Standard Eviscerates Equal Protection Guarantees

The *amici* represent thousands of small employers who look to the courts for protection from targeted legislation and selective prosecution. Reviewing courts must be permitted to look beyond mere stated objectives to the true intent behind targeted governmental action. Otherwise, a municipality may avoid scrutiny by merely articulating a false benign purpose. Here, Berkeley chose to assist a union. The combinations of victims and improper motivation are virtually limitless. Thus, if a municipality decided a company that "outsourced" work to India should be punished, the decision below allows the government to pass a "living wage" ordinance against that business, perhaps imposing an exorbitant living wage as punishment for the outsourcing. A city could impose a punitive "living wage" ordinance against a single gun shop or adult theater, so long as the articulated reason was to provide help to the poor. Cities could hold up building permit approvals, reject license applications, increase property taxes, or selectively enforce building or health codes all under the guise of some facially rational purpose. In short, courts must not abandon their duty to protect individuals and businesses from malicious or improper governmental acts.

II. Berkeley Violated the Contract Clause by Legislating a Retroactive Amendment to a Negotiated Lease

The Ninth Circuit rejected RUI's claim that the Marina Amendment violated the Contract Clause by impairing Berkeley's lease with RUI. The dissent below correctly concluded that by legislating a new contract term, Berkeley violated the Contract Clause.

The Contract Clause prohibits the passing of laws that impair obligation of contracts. U.S. Const. art. I, §10,

cl. 1. Under the established three-step analysis, courts first determine whether the law in question substantially impairs a contractual relationship. *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983). If so, the State must demonstrate the law has "a significant and legitimate public purpose . . . such as the remedying of a broad and general social or economic problem. . . ." *Id.* at 411-12. Requiring legislatures to demonstrate a broader social purpose helps assure that "the State is exercising its police power, rather than providing a benefit to special interests." *Id.* An otherwise proper law will nevertheless be stricken if the impairment is unreasonable or inappropriate. *Id.* at 412-13.

The majority below held that the Marina Amendment did not substantially impair any contract term. Judge Bybee disagreed, recognizing that because Berkeley was a party to the very contract allegedly impaired, the court was justified in applying a "stringent examination." *RUI, supra*, 317 F.3d at 1157-58 (Bybee, J., dissenting) (*quoting Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n. 15 (1978)). Berkeley legislated lease terms that it failed to negotiate. Prior to the Union's involvement, there is no indication the City even considered applying the LWO to Marina businesses before their leases were renegotiated.

Judge Bybee aptly noted that the Marina Amendment impaired RUI's lease agreement in several key respects. Most significantly, it added a contract term not previously contained within the "four corners" of the parties' lease agreement. *Id.* at 1161. Because RUI's lease contained an integration clause, the parties were prohibited from subsequently modifying the contract terms without a new agreement. *Id.* (citation omitted). The lease did include employer/employee issues, such as a clause requiring RUI to comply with the City's non-discrimination policies and a provision requiring that RUI "maintain adequate personnel for the efficient service of customers." Thus, Berkeley retroactively and unilaterally amended its lease with Petitioner.

The lease required RUI to "employ its best judgment, efforts and abilities to operate the business in a manner calculated to produce the maximum profitable volume of sales, rents and transactions maintainable. . . ." RUI estimates that complying with the Marina Amendment would increase annual labor costs by $121,000. As Judge Bybee noted, "[a]n increase in RUI's cost of operating Skates is a severe impairment that defeats the expectations of the parties under the contract." *Id.* at 1164 (*quoting Cont'l Illinois Nat'l Bank & Trust Co. v. Washington*, 696 F.2d 692, 700 (9th Cir. 1983)).

The majority found that Berkeley was immune from scrutiny because it acted within its police power in setting minimum wages. *Id.* at 1153-54. However, as Judge Bybee observed, the Marina Amendment was not a law of general applicability, where there would be greater public scrutiny to ensure the legislation was not motivated by an improper purpose. The Marina Amendment was targeted legislation aimed at one non-union lessee. Viewed correctly, Berkeley was a landlord with the power to make law.

Businesses must have some assurance that their contracts with local governments will not be subsequently modified to appease the desires of the politically powerful. When Berkeley and RUI entered into a lease in 1996, both parties considered the restaurant's operating expense as a touchstone for calculating an appropriate rent. By acceding to the Union's demands and applying the LWO to a business opposing the union's goals, Berkeley imposed a new onerous burden on RUI and substantially impaired existing lease provisions.

CONCLUSION

The Ninth Circuit's refusal to consider Berkeley's unlawful motive for targeting Marina businesses is inconsistent with circuit precedent from around the country, including the Ninth Circuit's own later decision in *Squaw Valley Dev. Co.*, 375 F.3d 936. In addition, following this Court's decision in *Olech*, the circuit courts widely diverge

on how to consider improper motivation in Equal Protection Clause cases, particularly those involving one or a few class members. This Court should thus grant certiorari both to reverse the judgment of the court below and clarify an increasingly divergent body of circuit precedent. Additionally, the Ninth Circuit's decision to permit the City of Berkeley to substantially impair its lease with RUI through targeted legislation should be reviewed and reversed. Businesses' ability to rely on the terms of contracts with state and local governments lies at the heart of the Contract Clause.

Respectfully submitted,

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